MAA SERVICES SDN BHD

v.

MARLIN RAJIMAN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING MOTION NO: R3-25-60-96]
1 NOVEMBER 2000

LABOUR LAW: *Industrial Court - Award - Findings of fact - Whether reviewable - Section 33B(1) Industrial Relations Act 1967*

The 1st respondent engaged the services of the applicant as an architectural illustrator with effect from 1 May 1984. The 1st respondent's prior service with the MAA Group commencing on 1 April 1984 was recognised by the applicant. The dispute before the Industrial Court concerned the 1st respondent's dismissal together with four other employees of the applicant.

The applicant applied to quash the award by the Industrial Court.

Held:

[1] The award of the Industrial Court is sheltered from judicial review except where the Industrial Court is shown to have committed an error of law.

[2] The Industrial Court has the duty to enquire into the reason as given by the employer for dismissing a workman and to enquire whether that reason has or has not been proved. In cases involving the retrenchment of workmen, our superior courts have recognised the well-established principle of "last in, first out" ("LIFO"). The LIFO principle is to be applied according to the respective categories of workmen, *ie*, their job functions, regardless of the "labels" given to the workmen's positions. The Industrial Court has the power to award compensation *in lieu* of reinstatement in addition to backwages.

[3] The Industrial Court has, *inter alia*, reached a correct and proper finding of fact that the 1st respondent's dismissal was a result of prejudice, *mala fides* and without just cause or excuse and it was correct in applying the LIFO principle. It has not acted without evidence nor did it act on mere conjecture.

[4] Findings of facts based on credibility of witnesses and documents by the Industrial Court are final and conclusive as provided for in s. 33B(1) of the Industrial Relations Act 1967 and are unreviewable.

[Application dismissed with costs.]

Case(s) referred to:

AMZ Corp Sdn Bhd v. Sye Ah Chai [1989] 1 MLJ 238 ***(refd)***
Dr A Dutt v. Assunta Hospital [1981] 1 MLJ 304 ***(refd)***
Goon Kwee Phoy v. J & P Coats (M) Sdn Bhd [1981] 2 MLJ 129 ***(refd)***
HM Shah Enterprises Sdn Bhd v. National Union of Hotel, Bar and Restaurant Workers [1990] 1 ILR 263 ***(refd)***
Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Anor Appeal [1997] 1 CLJ 665 ***(refd)***
Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor [1980] 1 MLJ 109 ***(refd)***
KFC Technical Services Sdn Bhd v. Industrial Court of Malaysia & Anor [1992] 1 CLJ 437 ***(refd)***
Kumpulan Perangsang Selangor Sdn Bhd v. Zaid Hj Mohd Noh [1997] 2 CLJ 11 ***(refd)***
Non-Metallic Mineral Products Manufacturing Employees Union v. Malaya Glass Factory Bhd [1984] 2 CLJ 9 ***(refd)***
Mak Weng Kit v. Reed Exhibitions Sdn Bhd [2000] 5 CLJ 253 ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(refd)***
William Jacks & Co (M) Sdn Bhd v. S Balasingam [1997] 3 CLJ 235 ***(refd)***

Legislation referred to:

Federal Constitution, art. 5(1)
Industrial Relations Act 1967, s. 33B(1)

For the applicant - HC Yong (TC Andrew Saw); M/s Ng Yook Woon Andrew TC Saw & Co
For the respondent - R. Subithra; M/s Lobo & Assoc

Reported by Yow Ting Fong

JUDGMENT

Faiza Tamby Chik J:

The applicant is a company that forms part of what is known as "the MAA Group", which is a group of companies carrying on a business in the architectural field. The MAA Group at the material time comprised of three companies, namely, the applicant and two other professional architect companies (ie, "Akitek MAA" and "Akitek MAA Sdn. Bhd."). The applicant was formed in 1984 to provide administrative and technical

support services to the aforesaid two professional companies. Marlin bt. Rajiman (the 1st respondent") had jointed the services of the applicant as an Architectural Illustrator with effect from 1 May 1984. The 1st respondent's prior service with the MAA Group commencing on 1 April 1984 was recognised by the applicant. The dispute before the Industrial Court concerned the 1st respondent's dismissal together with four other employees of the applicant (hereinafter referred to as "the five claimants") on 31 October 1985 (see the statement of case at p. 19 (in red ink) in encl. 1). The 1st respondent's letter of dismissal dated 31 October 1985 may be found at p. 22 of the exhibits in encl. 2. As pointed out by the applicant in its affidavit (encl. 1) para. 8, this case was actually first heard by the Industrial Court on 17 and 18 August 1987. The Industrial Court had dismissed all the five claimants' claims *vide* Award No. 254 of 1987. The five claimants then applied to the High Court for an order of *certiorari* to quash the Award No. 254 of 1987. The High Court heard their application and on 22 February 1992 dismissed it with costs. The five claimants then appealed to the Supreme Court who heard the matter *vide* Civil Appeal No. 02-101 of 1992. On 6 May 1994 the Supreme Court allowed the five claimants' appeal with costs and ordered the Industrial Court to hear and determine the dispute in accordance with the law. A copy of the case report is found marked as exh. "MR1" in encl. 13. As a result of the above, the case was remitted to the Industrial Court and heard by a different division from that previously. The five claimants' cases were heard by the Industrial Court over five full days and evidence both oral and documentary were adduced by both parties. The applicant called five witnesses to give evidence and the five claimants also gave evidence themselves. Subsequently, both parties filed their respective written submissions in the Industrial Court. The five claimants' submission (including authorities) is found at pp. 74 to 153 of encl. 1. The applicant's submission in reply (including authorities) filed in the Industrial Court is found at pp. 155 to 286 of encl. 1. The submission in reply filed on behalf of the five claimants is found at pp. 288 to 309 (including authorities) of encl. 2. *Vide* Award No. 192 of 1996 dated 16 May 1996 (hereinafter referred to as "the said Award") the Industrial Court dismissed the four other claimants' claims but held in favour of the 1st respondent. A copy of the said award is found marked as exh. "SY6" at pp. 311 to 331 of encl. 1. The relevant part of the award relating to the Industrial Court's specific findings regarding the 1st respondent is found at pp. 324 to 326 and p. 331 of encl. 1.

Section 33B(1) of the Industrial Relations Act 1967 ("the said Act") provides as follows:

> ... subject to this act and the provisions or order of the decision of the Court under this Act (including the decision of the Court whether to grant or not to grant an application under Section 33A, shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any Court.

It is therefore observed that the award of the Industrial Court is sheltered from judicial review, except where the Industrial Court is shown to have committed an error of law. Our Court of Appeal has held that the right to a livelihood is a fundamental liberty guaranteed by art. 5(1) of the Federal Constitution. In the case of *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan & Anor. Appeal* [1997] 1 CLJ 665 at p. 705, the Court of Appeal said:

> Quite apart from being a proprietary right, the right to livelihood is one of those fundamental liberties guaranteed under Pt. II of the Federal Constitution. See *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771 and the cases cited therein. The reasons for the view taken having been expressed by the majority in that case, I find it unnecessary to repeat them here. Suffice to say that the expression 'life' appearing in art 5(1) of the Federal Constitution is wide enough to encompass the right to livelihood.

It is trite law that the Industrial Court has the duty to enquire into the reason as given by the employer for dismissing a workman and to enquire whether that reason has or has not been proved. If the Industrial Court finds as a fact that it has not been proved, then the inevitable conclusion must be that the dismissal is without just cause or excuse. The Federal Court case of *Goon Kwee Phoy v. J & P Coats (M) Sdn. Bhd.* [1981] 2 MLJ 129 at p. 136:

> We do not see any material difference between a termination of the contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of the court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

It should be observed that in cases involving the retrenchment of workmen, our superior courts have recognised the well-established principle of "Last in, first out" ("LIFO principle"): see the case of *Kumpulan Perangsang Selangor Sdn. Bhd. v. Zaid bin Haji Mohd. Noh* [1997] 2 CLJ 11 where at p. 28 the Supreme Court said:

> In this context, we need do no more than to quote the following passage appearing in *"Dismissal, Discharge, Termination and Punishment"* by Malhotra, tenth edition, volume 1, at p. 791:
>
> > The order of retrenchment, therefore, should of course be left to the management and the decision of management that some are better qualified cannot be questioned by the Tribunal unless it comes to the conclusion that the preferential treatment was *mala fide*. If the preferential treatment given to juniors ignores the well recognized principle of industrial law that 'last come, first go', without acceptable or sound reasoning the Tribunal will be justified to hold that the action of the manage was not *bona fide.*
> >
> > But the rule of 'last come, first go' could have obviously no application to the case of retrenchment of the only employee in a particular category of workmen because in such a case **it is retrenchment of the post itself**, and therefore, if for reasons of economy and my genuine interest of reorganisation, the services of a single employee of a category have to be dispensed with, there is no scope for the application of this principle. (emphasis added).

It is trite law that the LIFO principle is to be applied according to the respective categories of workman, ie, their job-functions, regardless of the "label" given to the workman's position. In the case of *AMZ Corporation Sdn. Bhd. v Sye Ah Chai* [1989] 1 MLJ 238 at p. 241 Abdul Malek J (as he then was) said:

> It is evident that the applicant has made a mountain of the fact that Woo performed more duties than the respondent as the former worked at headquarters and had additional functions as secretary to the managing director whereas the respondent was only a clerk at the estate office. Despite this fact, I can see no error made by the Industrial Court in holding that both Woo and the respondent were actually from the same category of 'workman' as both were actually clerks and that there was no reason for. the more senior clerk of the two, namely, the respondent, to be retrenched first.

Also it is trite law that the Industrial Court has the power to award compensation *in lieu* of reinstatement in addition to backwages. In the case of *Dr. A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304 at p. 314:

We are of the opinion that upon a true interpretation, the Industrial Court may properly award compensation where the dismissal is without just cause or excuse, if, in its considered view, it does not think reinstatement should be ordered.

We therefore agree with the decision of the High Court in Penang in *Goon Kwee Phoy v. J. & P. Coats (M) Bhd.* when it held expressly that compensation could be awarded to a workman who had been dismissed without just cause or excuse. But in coming to its decision the High Court also expressly disagreed with the judgment in *Hotel Jaya Puri Bhd. v. Union of Hotel, Bar and Restaurant Workers & Anor.*, a case of a reference under section 26 of the Act. In that case, the High Court, in respect of section 30(6),

> ... tried to find the basis why compensation is paid at all. If there is a legal basis for paying the compasation, the question of amount of course is very much a matter of discretion which the Industrial Court is fully empowered under section 30 of the Industrial Relations Act to fix, but where there is no legal basis for the payment of compensation, I do not think that the President can create legal right and obligation for it and, in my view, the award will clearly be an error of law... .

If by this is meant that the Industrial Court cannot award compensation to a workman who has been dismissed without just cause or excuse, we would disagree with it. But on the facts in that case, the court was of the view that the workmen had been dismissed "neither illegally or wrongly or improperly" and there was therefore no legal basis for the award of compensation and that we entirely agree with. It would appear that the High Court in *Goon Kwee Phoy* has entirely misunderstood the *Hotel Jaya Puri* judgment in disagreeing with it.

It is to be noted that in the case of *Hotel Jaya Puri Bhd. v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109 at p. 112 the High Court has held that:

> The next point which I have to consider is the basis how and why the President gave an award of compensation of two months' salary and fixed allowances against the Hotel. I tried to find the basis why compensation is paid at all. If there is a legal basis for paying the compensation, the question of amount of course is very much a matter of the discretion which the Industrial Court is fully empowered under section 30 of the Industrial Relations Act to fix, but where is no legal basis for the payment of compensation, I do not think that the President can create legal right and obligation for it and, in my view, the award will be clearly an error in law for which I am prepared to allow this application.

In *KFC Technical Services Sdn. Bhd. v. Industrial Court of Malaysia & Anor*. [1992] 1 CLJ 437 at p. 441 Eusoff Chin J (as he then was) said:

> In *Hotel Jaya Puri Bhd. v. National Union of Hotel, Bar and Restaurant Workers & Anor* at p. 113, the Federal Court held that, if there was a legal basis for paying compensation the question of the amount was very much a matter for the discretion of the Industrial Court to fix under s. 30 of the Act. In that case the Industrial Court had ordered the amount of compensation to be two months' salary for each year of service, but the Federal Court quashed this order because there was no basis to order compensation. This is because the Federal Court had found that the termination of the services of the employees was with just cause or excuse.
>
> I find that the Industrial Court had correctly made the order of payment of compensation to the dismissed employees and having regard to the reasons and circumstances leading to the dismissal of the employees, I think the amount of compensation of two months; salary for each year of service which the Industrial Court described as punitive compensation, is justified.

In the instant case I am of the view that the Industrial Court had *inter alia,* reached a correct and proper finding of fact that the 1st respondent's dismissal was as a result of prejudice, *mala fides* and without just cause or excuse (see p. 331 (last para of encl. 1)).

The Industrial Court's grounds for making the abovestated finding of fact may found at pp. 324 to 326 of encl. 1. It is my view that the Industrial Court was correct in applying the LIFO principle because the applicant had "ignored the said well recognised principle (of LIFO) without any acceptable or sound reasoning". (See the relevant extract of Malhotra cited with approval by the Supreme Court in the case of *Kumpulan Perangsang*). The Industrial Court had not acted on no evidence nor did it act on mere conjecture as submitted by the applicant. The testimony of the applicant's own witness (COW2) who was the 1st respondent's boss at the material time is material and relevant (see pp. 19 and 20 of the Notes of Evidence (encl. 6)).

In the *H.M. Shah Enterprises Sdn. Bhd. v. National Union of Hotel, Bar and Resstaurant Workers* [1990] 1 ILR 263 case it is stated that as a matter of practice, backwages is limited to 24 months. But this practice is not strictly adhered to even by the Industrial Court. For example, the Industrial Court Chairman in the *H.M. Shah*'s case also stated that the usual practice for awarding compensation *in lieu* of reinstatement is one month's salary for each completed year of service. (See p. 269 para E-left). However, this practice was not complied with by the Industrial Court in the *KFC Technical Services* case. The Industrial Court in the *KFC Technical Services*

Sdn. Bhd. case had ordered the employer to pay compensation to the dismissed employees amounting to two months' salary for each year of service. The employer was dissatisfied and applied to the High Court to quash the said award. It is noted that the employer used the very same argument as the present applicant in its submission that the Industrial Court had "failed to observe the normal practice". The High Court however rejected the said argument. I am of the opinion that the Federal Court case of *R. Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 is in fact in the 1st respondent's favour for the following reasons:

(i) The Federal Court in that case had ordered compensation to be paid to the workman in order to prevent unnecessary prolongation of proceedings and to avoid drawn out litigation with consequent hardship to the employee (see page 151 para E).

(ii) The cause of the delay and prolonged litigation was due to the present Applicant having taken a technical objection (estoppel) in the first proceedings before the Industrial Court. Just as the Applicant submits that it should not be penalised for the delay, the 1st Respondent also should not been deprived of the fruits of her litigation;

(iii) Thirdly, the Federal Court in the *R. Rama Chandran*'s case had ignored the Industrial Court's practice when it computed the backwages and compensation due to the appellant. The Federal Court had even ordered payment of loss of future earnings in that case (see page 170 paras f to h).

I am of the view that the applicant's submission is actually amounting to a challenge of the findings of fact made by the Industrial Court correctly based on all the evidence, oral and documentary, adduced before it. This cannot be entertained. Based on the totality of the oral and documentary evidence adduced before the Industrial court, the Industrial Court correctly made an express finding of fact that the retrenchment of the 1st respondent was prejudiced, *mala fide* and without just cause or excuse (this part of the award ie, last part of the last paragraph on p. 21 of the award) was not sought to be quashed by the applicant. The said two exceptions envisaged in the case of *Rama Chandran* is not applicable in this case. There was no reliance by the Industrial Court on an erroneous factual conclusion and the Industrial Court's decision was made based on all of the evidence adduced. It is trite law that findings of facts based on credibility of witnesses and documents by the Industrial Court are final and conclusive as provided for in s. 33B(1) of the Industrial Relations Act 1967 and is unreviewable. In *William Jacks & Co. (M) Sdn. Bhd. v. S. Balasingam* [1997] 3 CLJ 235:

> The question at the end of the day is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it. However widely understood the proposition in *Rama Chandran and Amanah Butler (supra)* may be, it does not include the review, in *certiorari* proceedings, of findings of fact based on the credibility of witnesses.

In *Mak Weng Kit v. Reed Exhibitions Sdn. Bhd.* [2000] 5 CLJ 253 at p. 258 the Court said:

> The evidence of Mr. Lau was backed by the evidence of the non-executive chairman of the company, Dr. Mohd. Tajuddin Mohd Jali, and showed that the claimant's re-assigned position was separate and distinct from the general manager's position. It is clearly established in law that where the Industrial Court has made findings of facts based on the credibility of witnesses it saw and heard, such findings of facts cannot be impugned in the judicial review in *certiorari* proceedings. The third ground has no merit.

For these reasons I conclude that the Industrial Court had not committed any error of law when making those parts of the award which the applicant is now seeking to quash. It is to be noted that the applicant has not applied to quash part of p. 21 (last page) of the award (see p. 331 in encl. 1) where the Industrial Court has made an express finding that the 1st respondent's retrenchment was prejudiced, *mala fide* and without just cause or excuse. In the case of *Non-Metallic Mineral Products Manufacturing Employees Union v. Malaya Glass Factory Bhd.* [1984] 2 CLJ 9, the Federal Court laid down the principle that certain parts of an award will only be severed and quashed if it would not make what remained of the award unworkable. There the Federal Court held:

> Held: three of the five disputed items were within jurisdiction and only the awards relating to check off and accident leave were made without jurisdiction. The severance of the two articles would not make what remained of the award unworkable and therefore in this case only the award in respect of the two articles should be quashed.

Consequently in the instant case since the applicant has not applied to quash that part of p. 21 of the award (p. 331 in encl. 1), which is the express finding made in respect of the 1st respondent, this means that even if the applicant succeeds in its application, the result would be that the remaining parts of the award would be unworkable and meaningless. In the result the application is hereby dismissed with costs.